



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Earth Property Services, Inc.

File: B-237742

Date: March 14, 1990

John M. Taffany, Esq., Bailey & Shaw, P.C., for the protester.
Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging sole-source award of an interim contract for housing maintenance services based on unusual and compelling urgency is sustained where contracting agency failed to obtain maximum practicable competition by not soliciting protester, who record showed was a viable additional source since it had recently provided the services at issue, and had advised the agency that it was in a position to begin performance on short notice.

DECISION

Earth Property Services, Inc. (EPS), protests the Department of the Army's award of contract No. DAKF40-90-C-0085, to J&J Maintenance, Inc., for maintenance of 4,843 housing units at Fort Bragg, North Carolina. The Army issued the sole-source contract to J&J, the incumbent contractor, based on a determination that an unusual and compelling urgency for the maintenance services existed and that J&J was the only source in a position to provide immediate continuing service. EPS, the previous supplier of housing maintenance services at Fort Bragg, argues that the Army improperly invoked the claim of urgency, and asserts that even if the Army did have an urgent need for the maintenance services, it nonetheless improperly excluded EPS from consideration.

We sustain the protest.

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The Army initially issued a competitive fixed-priced solicitation for family housing maintenance at Fort Bragg on October 12, 1988. Bids were received and opened in April 1989 and, on May 17, contract No. DAKF40-89-D-0063 was awarded to J&J, with performance commencing June 1. Immediately after award, J&J began experiencing problems performing its contract due to significant discrepancies between the work estimates set forth in the solicitation and the actual work required to be performed. In this regard, the contracting officer explains that: (1) the number of quarters vacated and requiring maintenance prior to new occupancy exceeded estimates based on historical work loads by 50 percent; (2) the number of service calls in the first 4 months of J&J's contract equaled 66 percent of the service calls predicted for the entire 12-month period; (3) labor and materials costs were four times higher than expected; and (4) several ambiguities were identified in the contract specifications, especially the specifications related to exterior maintenance of the housing units.

Due to these difficulties, and faced with cash-flow problems related to withheld payments by the government, J&J essentially ceased performance of its contract on October 5. Shortly thereafter, J&J and the Army attempted to resolve these issues through negotiations. At the conclusion of the negotiations, J&J agreed not to file a claim against the Army for the additional work not identified in the solicitation, and the contracting officer agreed to return monies withheld from J&J for failure to perform in accordance with the contract. In addition, in return for J&J's agreement not to file a claim, the contracting officer agreed to permit J&J to cease performance of its fixed-price contract and to award a new contract to J&J effective November 1, 1989. This new contract, a cost-plus-award-fee agreement, was to extend from November 1, 1989, through May 31, 1990, with one 6-month option.

EPS protested to our Office on November 9, claiming that the contract awarded to J&J was an improper sole-source contract in violation of the requirement for full and open competition in the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (1988). EPS also contends that the Army should have used a fixed-price rather than a cost-type contract for the services. As explained in detail below, we believe the Army erred in refusing to permit EPS to participate in a limited competition for the housing maintenance contract.

Under CICA, an agency may use other than fully competitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the

government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2). However, this authority does not automatically justify a sole-source award. Rather, the authority is limited by 10 U.S.C. § 2304(e), which requires agencies to request offers from as many potential sources as practicable under the circumstances. Consequently, sole-source awards are proper only where the agency reasonably believes that only one firm promptly and properly can perform the required work, due to the urgent circumstances. Data Based Decisions, Inc., B-232663, B-232663.2, Jan. 26, 1989, 89-1 CPD ¶ 87. Further, when an agency uses noncompetitive procedures, it must execute a written justification for doing so, which is to include a description of efforts made to ensure that offers are solicited from as many sources as practicable, and a description of any market survey conducted or a statement of the reasons why a market survey was not conducted. 10 U.S.C. § 2304(f)(3); TMS Building Maintenance, 65 Comp. Gen. 222 (1986), 86-1 CPD ¶ 68.

In support of its decision to make a sole-source award to J&J, the Army states that J&J's threatened abandonment of the housing maintenance contract required it to terminate J&J's fixed-price contract and award an emergency cost-type contract until the Army could redraft its solicitation to match its actual needs. The Army claims its need for an interim contract to provide housing maintenance was urgent because the Army lacks resources to perform the work in-house, and because failure to maintain such housing while soliciting competitive offers would cause unsightly deterioration; possible health and safety hazards; increased expenditures by the Army for quarters allowances for soldiers denied on-base housing because such housing could not be prepared for new occupants; and increased expenditures by the Army for housing maintenance at a later date because the housing stock was permitted to deteriorate.

The Army further argues that, after determining it had an urgent need for uninterrupted housing maintenance, it appropriately considered only J&J for award. The Army claims that only J&J was in a position to offer uninterrupted service, and that any other contractor would confront a substantial learning period before mastering the various housing areas, types of housing, types of heating and cooling units in the houses, and types of supplies available for maintenance. In addition, the Army argues that directing award to J&J for a limited period was reasonable because the Army needed to revise its solicitation to address the problems that had arisen in J&J's performance on the terminated contract.

EPS counters that even if the Army had an urgent need for uninterrupted service, the Army nonetheless failed to maximize competition as required by CICA by refusing to permit EPS to participate in a limited competition for the interim contract. EPS notified the Army it could begin performance on short notice if needed, and claims it would experience few start-up difficulties since EPS was the housing maintenance contractor prior to J&J. Further, EPS charges that the underlying reason for the Army's decision to ignore EPS and to direct award to J&J was a settlement agreement entered into between J&J and the Army to forestall J&J's threatened claim for the cost of additional work required during the performance of J&J's prior contract.

Although we see no basis to question the Army's determination that urgent circumstances justified its decision to limit competition, we find that the Army's decision to consider only J&J for award was improper. The new contract is not simply an interim version of the contract originally awarded to J&J: it replaces a fixed-price contract with a cost-plus-award-fee contract, and in effect substitutes a greatly expanded scope of work due to the inadequacy of the requirements estimated in the original solicitation. The record also shows that the Army recognized that other sources were available; that EPS advised the Army that it could begin performance on short notice if asked; and that EPS had performed the housing maintenance contract at Fort Bragg prior to award to J&J in May 1989. Thus, the record does not support the Army's argument that only J&J was in a position to perform and that any other contractor would face a substantial learning period before being able to perform effectively.

The Army does not directly rebut the protester's contention that it was prepared to perform on short notice; instead, the Army generally questions the protester's veracity and credibility. The record reflects no such concern on the Army's part at the time of the decision to exclude EPS; this general challenge to EPS' veracity was first raised in the Army's legal memorandum to our Office in opposition to the protest. Further, the record does not suggest that the Army otherwise considered EPS to be nonresponsible. In short, the Army simply fails to explain why it could not consider EPS on the same basis it considered J&J for award of an interim contract while drafting a solicitation suitable for full and open competition.

Further, the Army's Justification and Approval for other than full and open competition provides in part as follows:

"In exchange for J&J Maintenance not filing any claims against the Government for additional work performed, for the poor condition of the quarters and for additional excess service order work, the Government agreed to change the term of the existing contract . . . and establish a new cost plus award fee contract with J&J Maintenance for the remaining seven month period with one six month option."

Although it appears that the Army acted responsibly in responding to J&J's performance problems related to the inadequate specifications, a settlement agreement promising award of a contract on a sole-source basis as a quid pro quo for abandoning threatened litigation is not a permissible basis for excluding potential offerors. The existence of a settlement agreement does not permit the contracting agency to act in ways not otherwise permitted by applicable statutes and regulations. See Techplan Corp., 68 Comp. Gen. 429 (1989), 89-1 CPD ¶ 452.

For the reasons set forth above, we find the Army's exclusion of EPS from consideration for award of the interim contract to be unreasonable and in violation of the statutory requirement to maximize competition to the extent practicable in an urgent procurement. Data Based Decisions, Inc., B-232663, B-232663.2, supra. Since we sustain the protest on this ground, we need not consider the other issue raised by EPS, whether the Army's issuance to J&J of a cost-type rather than fixed-price contract was proper.

In view of the short period of time remaining in the basic term of J&J's contract, we do not think it is appropriate to terminate the contract and recompet. However, we recommend that the Army refrain from exercising the 6-month option in J&J's contract and instead either (1) conduct a fully competitive procurement based on a revised solicitation accurately reflecting the Army's needs; or (2) if additional time is required to complete the revised solicitation, procure the services on an interim basis for a limited period, restricting competition only to the extent permitted under CICA and at a minimum allowing EPS the opportunity to compete for the interim contract.

Finally, we find that EPS is entitled to recover the costs of filing and pursuing the protest, including attorneys'

fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1989). The protester should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

Shilton F. Fowler
for Comptroller General
of the United States